No. 20,003

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON SLAVITT,
Plaintiff-Appellant,

vs.

GILBERT KAUHI, ABRAHAM KAPANA, and SPENCECLIFF CORPORATION, LTD.,
Defendants-Appellees.

Upon Appeal from the United States District Court for the District of Hawaii

ANSWERING BRIEF ON BEHALF OF GILBERT KAUHI, ABRAHAM KAPANA, AND SPENCECLIFF CORPORATION, APPELLEES

BURNHAM H. GREELEY,
ALEXANDER C. MARRACK,
Fourth Floor, Bishop Trust Building,
Honolulu, Hawaii,
Attorneys for Defendants-Appellees.

ROBERTSON, CASTLE & ANTHONY,
Fourth Floor, Bishop Trust Building,
Honolulu, Hawaii,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Rules

Statutes

Texts

No. 20,003

IN THE

United States Court of Appeals

For the Ninth Circuit

LEON SLAVITT,
Plaintiff-Appellant,

vs.

GILBERT KAUHI, ABRAHAM KAPANA, and SPENCECLIFF CORPORATION, LTD.,
Defendants-Appellees.

Upon Appeal from the United States District Court for the District of Hawaii

ANSWERING BRIEF ON BEHALF OF GILBERT KAUHI, ABRAHAM KAPANA, AND SPENCECLIFF CORPORATION, APPELLEES

JURISDICTION

Jurisdiction of the District Court was based upon 28 U.S.C. Sec. 1332. The jurisdiction of this Court is founded on 28 U.S.C. Secs. 1291 and 1294.

Judgment below was entered on December 8, 1964, (R. 132). Appellant's motion for new trial and for judgment notwithstanding the verdict filed on December 9, 1964 (R. 132), was denied on December 29, 1964 (R. 140). Notice of appeal was filed on January 20, 1965 (R. 142).

STATEMENT OF THE CASE

The incident in question occurred in the early hours of September 23, 1960, at the Barefoot Bar in Honolulu. Appellant arrived at the bar around 1:00 to 1:30 A.M., with Miss Rhoades, an airline stewardess (Tr. 113). Prior to his arrival he had enjoyed a scotch and soda, a glass of wine and two mai-tais.[1]

At the bar appellant consumed a third mai-tai and part of a fourth (Tr. 112-114).

After the floor show, appellant was requested to finish his drink by an unidentified man (Tr. 114-115). He protested and claimed that he was then bodily carried to the exit at the head of the stairs and thrown through the air to the first landing (Tr. 116) about 6 steps below (Tr. 68).

Mr. Kauhi, employed by Spencecliff Corporation, Ltd., as a doorman (Tr. 64), testified that he had approached appellant near closing time and asked him to finish his drink (Tr. 76, 77). Appellant objected so Mr. Kauhi notified the assistant manager, Mr. Kapana (Tr. 78). Mr. Kapana talked with appellant and then asked Mr. Kauhi to call the police (Tr. 83). While completing the call downstairs, Mr. Kauhi heard a "boom-boom-boom" noise. Running up the stairs, he saw plaintiff seated on the landing (Tr. 98, 101).

Mr. Kapana, the assistant manager, testified he went to appellant's table near closing time and asked him to finish his drink (Tr. 262). Appellant became angry and abusive and threatened to have Mr. Kapana

---

[1]A mai-tai contains about 2 oz. of rum (Tr. 195).

fired (Tr. 264) and finally took a swing at Mr. Kapana (Tr. 265). After that, appellant was told he must leave (Tr. 265) and was escorted by Mr. Kapana to the exit (Tr. 267). Mr. Kapana then returned to the table to help Miss Rhoades (Tr. 280, 282), leaving appellant standing at the head of the stairs (Tr. 280).

As Mr. Kapana was returning to the table, he heard a thud like some object had fallen on the steps (Tr. 282). He returned to the stairs and saw appellant sitting on the landing (Tr. 283).

QUESTIONS PRESENTED

1. Did the Court abuse its discretion in prohibiting an amendment which contradicted the issues tried by appellant and which was without foundation in law?

2. Was it prejudicial error to refuse instructions detrimental to appellant or to give instructions which correctly set forth the issues or the law?

3. Did the Court abuse its discretion in regulating final argument?

SUMMARY OF ARGUMENT

Appellant contended throughout trial that, although sober and peaceful, he was summarily carried to the stairs and thrown from the bar by appellee Kapana. At the end of the trial, he attempted by amendment to also claim that he was negligently abandoned at the head of the stairs in a drunken condition and allowed

to fall. The latter theory not only surprised the Court and conflicted with the agreed issues but is in disregard of the common law rule imposing no liability on vendors for injuries received by intoxicated patrons.

Appellant also complains of a refusal to give his instructions when they would only have confused the jury and added to his burden of proof. In addition, he ignores the acknowledged purpose of several instructions and the only possible construction given them by the jury.

Appellant's final contentions relate to argument but fail to demonstrate that he either properly objected to any inadequacy of the court's supervision of argument or that the court abused its discretion in allowing a comment on the lack of testimony by his companion, Miss Rhoades.

ARGUMENT

I

APPELLANT'S THEORY THAT HE WAS ENTITLED TO BE GUARDED AGAINST INJURY DUE TO HIS OWN INTOXICATION IS WITHOUT FOUNDATION.

The testimony presented two sharply conflicting versions of the accident. Appellant strongly insisted that he was bodily thrown down the stairs (Tr. 115-116).

Appellees, on the other hand, presented evidence that appellant had become abusive, was escorted to the exit (Tr. 265-267), and thereafter fell while descending the stairs alone (Tr. 336-337).

Although the pre-trial order and evidence at trial produced only these two distinctly opposite positions, much of appellant's brief is devoted to his belated attempt and the court's refusal to force a third theory before the jury.

Appellant contends that once appellees sold appellant a drink they thereafter had a duty to safeguard his welfare and could be found negligent if they allowed appellant to exit and negotiate the stairway on his own (Tr. 377, 400, 406; Op. Br. Argument I & IV; Instruction P-13, R. 58, P-22, R. 67).

The basic fallacy of appellant's position is that the purported duty does not exist. At common law, it is thoroughly established that a vendor of liquor has no liability to the consumer for injuries incurred as a result of the latter's intoxication.[2]

In *Hitson v. Dwyer,* 61 Cal. App. 2d 803, 143 P.2d 952 (1943), plaintiff sued for injuries received when defendants served him liquor while he was obviously in an intoxicated condition. As a result he fell from a bar stool to the floor. The court dismissed the case, stating:

> From our examination of the numerous cases cited we find none which hold, in the absence of a statutory enactment to the contrary, that the sale of intoxicating liquor was the proximate cause of injuries subsequently received by the purchaser because of the intoxication. Rather we find the

---

[2]Hawaii, by statute, has adopted the common law. "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of of Hawaii. . . ." Sec. 1-1, Revised Laws of Hawaii, 1955.

> general rule to be . . . : 'The common law gave no remedy for the sale of liquor, either on the theory that it was a direct wrong or on the ground that it was negligence which would impose a legal liability on the seller for damages resulting from intoxication'. (p. 955)

Malone v. Lambrecht, 305 Mich. 58, 8 N.W. 2d 910 (1943), involves an application of the common law rule to a factual situation quite similar to appellant's present claim. There plaintiff drank liquor in defendant's establishment and became intoxicated. Defendant, nevertheless, continued to serve him more. While intoxicated, plaintiff was directed to a basement washroom by defendant and allowed to proceed unescorted. In doing so, he fell down the stairway and was injured.

Although Michigan had both a dramshop act and a statute making the sale of liquor to an intoxicated person unlawful, the dismissal of the complaint was affirmed.[3]

In *Cole v. Rush,* 45 Cal. 2d 345, 289 P.2d 450 (1955), the rule was again followed although defendants had been warned in advance by the plaintiff widow not to serve her husband because he, although normally quiet, became quarrelsome when intoxicated.

---

[3]Hawaii does not have a dramshop statute. The statute forbidding sale of liquor to an intoxicated person (Op. Br. 49, 54) does not have any bearing herein since there is no evidence appellant was inebriated when served by appellee and the statute does not purport to change the common law rule or establish a civil right of action. See: *Moyer v. Lo Jim Cafe, Inc.,* infra; *Noonan v. Galick, infra; Elder v. Fisher,* 205 N.E. 2d 235 (Ind. 1965); *Knierim v. Izzo,* 22 Ill. 2d 73, 174 N.E. 2d 157 (1961).

The court in *Noonan v. Galick,* 19 Conn. 308, 112 A. 2d 892 (1955), denied recovery to an intoxicated woman who was struck by an automobile while lying in the street. The court held the vendor not liable, stating:

> There is abundant authority for the proposition that no remedy exists against the dispenser of liquor for injuries and damage resulting from the acts of an intoxicated person except to the extent provided by statute. . . .
>
> If there is no remedy at common law against the seller in favor of one injured by the purchaser of liquor, certainly there can be none in favor of the intoxicated person itself. (p. 894)

In *Moyer v. Lo Jim Cafe, Inc.,* 19 App. Div. 2d 523, 240 N.Y.S. 2d 277 (1963), the court dismissed a complaint claiming damages for injuries received as the result of a fall while intoxicated, and stated flatly that:

> There was no special duty resting upon defendant to protect plaintiff from the results of her voluntary intoxication. (p. 279)

See also:

Megge v. United States, 344 F. 2d 31 (6th Cir. 1965);

Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950);

48 C.J.S., *Intoxicating Liquors,* Sec. 430;

30 Am. Jur., *Intoxicating Liquors,* Secs. 523, 524;

54 A.L.R. 2d 1152.

The second fallacy of appellant's present position is that it conflicts directly with his own testimony at trail and his agreed pre-trial theory of the case.

In the pre-trial order, appellant stated as his theory of recovery, that he was "negligently or intentionally pushed or thrown down the stairs . . ." (R. 29).

In his opening argument, counsel for appellant promised that the evidence would show that a man "picked him up out of that chair bodily, walked to the stairway . . . and threw the plaintiff down the stairway . . ." (Tr. 5-6).

At trial, appellant testified that he was bodily thrown down the stairs (Tr. 116).

Not once during the entire course of the case did appellant claim that he fell due to intoxication or that he was in fact intoxicated. Rather he flatly denied this in his testimony, stating that the drinks had no effect on him. He was not slurring his speech and was not unsteady in his gait (Tr. 159).

Under these circumstances, it is understandable that both counsel for appellees and the trial court were surprised when appellant's counsel attempted to assert liability for negligently failing to protect appellant from possible injury due to his own intoxication.

The court properly recognized that appellant's new theory went beyond the issues tried in the case (Tr. 390-391).

It is the duty of the trial court to determine whether an issue not pleaded has been tried by the parties. *Chesapeake & Ohio Ry. v. Newman,* 243 F. 2d

804, 812 (6th Cir. 1957). If the court finds, as was done here, that the issue was not so tried, Rule 15(b), is not applicable. *Sears Roebuck & Co. v. Marhenke,* 121 F. 2d 598 (9th Cir. 1941).

It is then properly within the court's discretion to deny an attempted amendment and limit the jury's consideration to the theories and evidence presented at trial. *Hargrave v. Wellman,* 276 F. 2d 948 (9th Cir. 1960); *Young v. Johnson,* 286 F. 2d 365 (10th Cir. 1960); Cf: *United States v. 47 Bottles,* 320 F. 2d 564 (3rd Cir. 1963).

ARGUMENT

II

THE COURT DID NOT ERR IN GIVING OR FAILING TO GIVE INSTRUCTIONS.

A. Appellant cannot complaint of a failure to give instructions detrimental to his position or ask review of instructions given without objection.

Under Court's instruction number 18, the jury was informed that appellant could recover if Mr. Kapana threw him down the stairs causing him injury (R. 110, Tr. 495).

Appellant contends that this instruction was unduly limiting and that the jury should also have been given definitions of assault and battery (Instruction P-11) and negligence (Instruction P-22) (Op. Br. pp. 50 and 57).

There is no question that, if appellant's testimony was believed, he suffered an assault or that, in the

pre-trial order, he claimed to have been negligently thrown down the stairs.

Appellant, however, fails to recognize that under the court's instruction it was immaterial whether Mr. Kapana's purported actions were negligent or non-negligent or whether Mr. Kapana had committed an assault *and* also had manhandled appellant. The jury was free to ignore these technical preliminary matters and hold appellees liable if they simply found appellant had been thrown down the stairs.

Contrary to appellant's belief, his burden would have been increased if his instructions on assault or negligence had been given, for the jury would then have plainly been told that appellant had the burden of proving not only that he had been thrown but *also* that the act was either negligent or an intentional assault and battery.

It is obviously not the duty of a court to give instructions which confuse rather than assist the jury and if the instructions given adequately cover the issues, no further instructions are necessary. *Southern Pac. Co. v. Souza,* 179 F. 2d 691, 694 (9th Cir. 1950); *Estate of Ching,* 46 Hawaii 127 (1962).

Nor can a party complain of a refusal to give instructions which operates to his benefit. Cf: *Tabor v. Hahs,* 398 S.W. 2d 7 (Mo. App. 1965); *Brockie v. Shadwick,* 396 S.W. 2d 63 (Ky. App. 1965); *Painter v. State Dept. of Roads,* 177 Neb. 905, 131 N.W. 2d 587 (1964).

Appellant further complains that Court's instruction number 18 allowed recovery only if he was bodily

thrown down the stairs and would prevent the jury from considering whether he was pushed or shoved (Op. Br. p. 60).

Again appellant must recall that in all of the testimony favoring recovery, there is no mention that he was pushed, tripped or shoved. Any finding to this effect would have been pure speculation and any instruction on this point would have been unsupported by any evidence and erroneous. *Teegarden v. Dahl,* 138 N.W. 2d 668, 677, (N.D. 1965); *Salinas v. Kahn,* 2 Ariz. App. 181, 407, P. 2d 120, 130 (1965).

Nor did appellant properly object to this instruction as modified. When the court originally read the instruction to counsel, appellant did object and suggest a change (Tr. 405-407). The court then modified the instruction to eliminate the statement about appellant being carried to the stairway, in accordance with appellant's request. After the modification appellant said nothing (Tr. 407).

Both Rule 51, F.R.C.P. and the decisions of this Court prohibit appellant from remaining silent when an objection could have benefited the trial court and then complaining of error on appeal. *Crespo v. Fireman's Fund Ind. Co.,* 318 F. 2d 174 (9th Cir. 1963); *Cosper v. Southern Pac. Co.,* 298 F. 2d 102 (9th Cir. 1961).

B. Defendants' Instructions Nos. 2 and 3 were not erroneous.

Appellant argues that the court erroneously instructed the jury that contributory negligence in the form of willful intoxication would bar any recovery (Op. Br. 45).

The record affirmatively shows that appellant is mistaken both in his reading and interpretation of the instruction.

All references to negligence or contributory negligence were voluntarily withdrawn from instruction D-2 when appellant's negligence theory was disallowed (Tr. 391, 392).

Nor was the instruction presented on a contributory negligence basis. It was merely a statement of appellee's contention. The jury was not told that intoxication which proximately contributed to the accident in any degree would bar recovery even though they found that appellant had been thrown down the stairs.

On the contrary, both counsel emphasized to the jury in argument that there were two basic and conflicting versions of the incident in evidence. Either appellant was thrown or he fell without fault of appellees. One version resulted in liability and the other a verdict for appellees and it was the jury's prerogative to accept either one (Tr. 410, 411, 430, 432 and 445).

Niether counsel nor the court argued or implied that the jury could adopt *both* positions or that acceptance of both would bar recovery as would an ordinary finding of negligence and contributory negligence.

It is, of course, proper for the court to instruct the jury as to the theories of the parties, 88 C.J.S. *Trial,* Sec. 275 and appellant cannot complain if such an instruction could not mislead the jury. Cf: *Meissner*

v. Papas, 124 F.2d 720, 724 (7th Cir. 1941); *O'Brien v. Great Northern Ry.,* 145 Mt. 13, 400 P.2d 634 (1965); *Phoenix Mut. Life Ins. v. Harmegnies,* 110 F.2d 20, 26 (8th Cir. 1940).

Similarly instruction number D-3 stating the statutory duty of liquor licensees, had a very limited application and could not have resulted in jury confusion. There was evidence that appellant had become argumentative and profane and was asked to leave (Tr. 262, 263). Thereafter he was physically escorted to the exit (Tr. 267).

The instruction was necessary to inform the jury that appellees had a statutory right and obligation to escort a patron of appellant's demeanor away from the bar. Otherwise the jury could well have believed that when appellant was led by the arm to the stairs a battery had been committed and recovery was in order.

This was carefully explained to the jury in argument and no reference was made indicating that the statute would be any defense to liability for throwing appellant down the stairs (Tr. 456-458).

A charge is not erroneous simply because it sets forth a statutory provision in an abstract manner, particularly where there is no danger of misleading the jury. *City of Montgomery v. Jones,* 277 Ala. 617, 173 So. 2d 781 (1965).

If appellant felt that the jury might extend the statute and believe it afforded a defense to his claim of being thrown down the stairs, he was free to offer

an explanatory instruction stating that unreasonable force could not be asserted, as he now states in his argument (Op. Br. 52). Not having done so, his present complaints are ill founded. *City of Montgomery v. Jones,* supra; *Shepard v. Harris,* 329 S.W. 2d 1 (Mo. 1959).

ARGUMENT

III

APPELLEES' ARGUMENT WAS NOT IMPROPER NOR DID THE TRIAL COURT ABUSE ITS DISCRETION IN REGULATING THE ARGUMENT OF COUNSEL.

Limitation or regulation of argument lies within the broad discretion of the trial judge. *Twachtman v. Connelly,* 106 F.2d 501 (6th Cir. 1939). A trial court's determination of whether an argument is improper will not be reviewed unless the discretion of the court is clearly abused. *Braman v. Wiley,* 119 F.2d 991 (7th Cir. 1941); *Maryland Cas. Co. v. Reid,* 76 F.2d 30 (5th Cir. 1935).

Appellant objected to appellees' argument concerning the testimony of Officer Lapilio (Op. Br. 61) despite the fact that appellant testified as to his conversation with the officer (Tr. 119) and counsel for appellant mentioned appellant's statement to the officer in final argument (Tr. 422).

The argument, in context, does not appear to prejudice appellant (Tr. 452). However, the court sustained the objection and instructed the jury to disregard that portion of the argument (Tr. 492).

Appellant did not challenge the sufficiency of the court's admonition or offer further objection (Tr. 492, 505). His present claim that this admonition was inadequate is too late to be of assistance to the trial court or to form grounds for review herein. *Shepard v. Harris,* supra; Cf: *Quam v. Wengert,* 86 N.W. 2d 741 (1957).

Similarly, allowing appellees to refer to appellant's failure to call Miss Rhoades as a witness was not erroneous or an abuse of discretion.

Miss Rhoades admittedly must have had knowledge of the incident (R. 116), was a member of appellant's crew (R. 111, 112), and worked for appellant's employers both at the time of the incident (R. 111), and in the year of trial (R. 169). Appellant testified that he knew her address as late as three and one-half years after the incident (R. 168, 169). This testimony, of course, does not entirely agree with the comments made by appellant's counsel (Op. Br. 65). However, the evidence was certainly sufficient for the court to conclude that Miss Rhoades was a friend of appellant. Cf: *Claybrook v. Acreman,* 373 S.W. 2d 287 (Tex. App. 1963), and that she was available and her address known to appellant for a sufficient period of time to allow him to depose her.

A proper inference was therefore raised by the lack of any deposition and the court did not abuse its discretion in allowing counsel to so comment in argument. See: *Abel v. Yoken,* 104 N.H. 119, 179 A.2d 456 (1962); *Kierce v. Central Vt. Ry.,* 79 F.2d 198 (2nd Cir. 1935); *Williamson v. Feinstein,* 311 Mass. 322, 41

N.E. 2d 185 (1942); *Chesapeake & Ohio Ry. v. Richardson,* 116 F.2d 860 (6th Cir. 1941).

CONCLUSION

Appellant's entire approach to the issues before this Court involves a continual misconstruction of the actual happenings at trial. It is submitted that a theory directly contrary to his own testimony could not be an "issue tried with the consent of the parties"; that he cannot testify as to his sobriety and now claim intoxication, and that instructions limited in argument and presented to the jury in one light cannot now be stretched to extreme, merely to create error.

Nor can appellant rightly complain of acts of court which inured to his benefit, were brought about by his own testimony or of which he failed to complain at trial.

Dated at Honolulu, Hawaii, this 13th day of May, 1966.

Respectfully submitted,
BURNHAM H. GREELEY,
ALEXANDER C. MARRACK,
Attorneys for Defendants-Appellees.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Burnham H. Greeley